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[49]

Nullity in the Ordonnance

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1. Introduction

1. For the past two centuries, French legal doctrine has tried to elaborate a comprehensive theory of nullity to remedy the absence of such a framework in the *Code civil*. Due to the variety of sources in the *Ancien Régime*, the rules regarding nullity formed an intricate whole prior to the enactment of the *Code civil*.[1] Still largely inspired by those rules, the *Code civil* did not attempt to clarify the situation.[2] Up till now, both in France and in Belgium, the doctrine of nullity is regarded as one of the most obscure and impenetrable theories in private law.[3] Notwithstanding an unremitting interest in the matter,[4] scholarship has not sufficiently demystified the concept of nullity and the way it operates in private law. The announced revision of large parts of the *Code civil* offers a unique chance to elucidate the matter at hand and to boldly go where the *Code civil* has not gone before.

2. This paper will scrutinise whether the *Ordonnance* has indeed seized the opportunity. First, this paper will give a brief overview of the *Ordonnance*'s approach to nullity (2). Since the different aspects of nullity are too multifarious to deal with in a single paper, the scope of the research will be limited to the concept of nullity (3), its use (4), and its **[50]** enforcement (5) in the *Ordonnance*. As a consequence, the grounds of invalidity and the consequences of nullity (such as restitutions and potential liability connected to avoidance) will not be examined. Since the *Draft Common Frame of Reference* (*DCFR*) and the Dutch *Burgerlijk Wetboek* of 1992[5] have reconsidered the analysis of nullity, the *Ordonnance*'s propositions will be compared to those solutions in order to see whether the *Ordonnance* offers state-of-the-art solutions. The results of those comparisons will demonstrate to what extent the

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[1] Cumyn, *La validité du contrat suivant le droit strict ou l'équité: étude historique et comparée des nullités contractuelles* (LGDJ 2002), 12-3, no. 30.

[2] Picod, 'Nullité', in *Rep.civ.Dalloz* 2013, no. 7.

[3] For Belgium, see e.g. De Page, *Traité élémentaire de droit civil belge*, II, *Les incapables - Les obligations* (Bruylant 1964), 141, no. 96. For France, *cf.* Japiot, *Des nullités en matière d'actes juridiques - Essai d'une théorie nouvelle* (A. Rousseau 1909), 112 and Posez, 'La théorie des nullités - Le centenaire d'une mystification', *RTD Civ.* 2011, 647 *et seq.*

[4] In the past years, several authors have conducted penetrating inquiries into the topic. See e.g. Al Khoury, *Des nullités en matière civile - Essai de reconstitution d'une théorie en droit français et libanais en considération des perspectives européennes et internationales* (PhD-thesis Montpellier 2011); Posez (n 3), 647 *et seq.*; Sadi, *Essai sur un critère de distinction des nullités en droit privé* (Mare & Martin 2015). A comprehensive overview of the actual regime of nullity can be found in Ghestin/ Loiseau/Serinet, *La formation du contrat*, II, *L'objet et la cause - Les nullités* (LGDJ 2013), 697-1605, nos. 2001-2955.

[5] Hereinafter Dutch civil code or DCC.

Ordonnance can be a source of inspiration for the further development of the Belgian and Dutch law regarding nullity.

2. Overview of the Ordonnance's approach

3. The *Ordonnance* dedicates an independent paragraph to the remedy of nullity (art. 1178-85), whereas the *Code civil* only contains scarce and dispersed rules in this regard.[6] Since the majority of the relevant rules are to be found in that passage, those articles will occupy a prominent role in this paper. Art. 1178 starts with a description of nullity, its enforcement, and its consequences. The following articles (art. 1179-81) codify the classic distinction between absolute and relative nullity and its consequences (which relate to the difference regarding the parties allowed to invoke nullity and the possibility to confirm the null contract), with confirmation itself being described in the subsequent art. 1182. Art. 1183 offers a party the possibility to impose a choice on the party entitled to avoid the contract between the nullity and the validity of the contract. The following art. 1184 comprises a general recognition of the so-called 'partial nullity' and the maintenance of the contract if the law deems a specific clause unwritten ('répute non écrite') or if the aim of the violated rule requires its maintenance. Ultimately, art. 1185 codifies the so-called exception of nullity. Since the way the *Ordonnance* makes use of nullity can only be revealed by other, specific provisions, those other rules will also be taken into account.

The choice to regulate nullity in a specific chapter is not entirely innovative. Previous projects, such as the *Avant-Projet Catala*[7], the *Projet Terré*[8], the *Projet de la Chancellerie*[9] and the recent *Projet d'Ordonnance*[10], also bundled several aspects of nullity in a specific part of the text.[11] As the *Ordonnance* is to a large extent indebted to those projects, the comments on those previous propositions may elucidate the content of the *Ordonnance* and will therefore be scrutinised as well.

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3. The concept of nullity

3.1. Essential aspects and distinction with other remedies

4. Like the *Code civil*, the *Ordonnance* does not provide for an explicit definition of the concept of nullity. Nevertheless, the first article dedicated to nullity (art. 1178) is particularly revealing of the way it is perceived by the drafters. According to the first three paragraphs of that article, "*Un contrat qui ne remplit pas les conditions requises pour sa validité est nul. La*

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[6] See Ghestin et al. (n 4), 697-9, no. 2002.

[7] Avant-Projet de réforme du droit des obligations (Articles 1101 à 1386 du Code civil) et du droit de la prescription (Articles 2234 à 2281 du Code civil) – Rapport à Monsieur Pascal Clément, Garde des Sceaux, Ministre de la Justice – 22 Septembre 2005.

[8] Terré (ed.), *Pour une réforme du droit des contrats* (Dalloz 2009).

[9] Projet de réforme du droit des contrats, juillet 2008.

[10] Projet d'ordonnance portant réforme du droit des contrats, du régime général et de la preuve des obligations.

[11] *Avant-Projet Catala*: art. 1129 – 1130-3; *Projet Terré*: art. 78-88; *Projet de la Chancellerie*: art. 90-100.

nullité doit être prononcée par le juge, à moins que les parties ne la constatent d'un commun accord.
« Le contrat annulé est censé n'avoir jamais existé.
« Les prestations exécutées donnent lieu à restitution dans les conditions prévues aux articles 1352 à 1352-9."

5. With that description, the *Ordonnance* follows in the footsteps of earlier projects[12] and largely adheres to the predominant view on nullity in French scholarship. The only difference – but a very meaningful one – concerns the scope of nullity. Contrary to various authors, who apply nullity to every juridical act,[13] the *Ordonnance* only discusses nullity in the context of contracts. This should not come as a surprise, since the drafters did not opt for a different level of abstraction than the *Code civil*. Thus, contracts – and not juridical acts or declarations of will – remain the focal point of the regulation in French private law. With regard to other aspects of the notion of nullity, the *Ordonnance* aligns with the prevalent views in French scholarship. The *Ordonnance*, as well as the traditional doctrine, identifies nullity as a remedy for contracts/juridical acts which (at the time of their formation) do not comply with all legal requirements.[14] As a result of that invalidity, the contract/juridical act is deprived of its effects.[15] Both the *Ordonnance* and legal scholarship consider a judicial intervention necessary to enforce nullity: as long as the judge has not declared the nullity of the invalid juridical act, that act still produces its legal effects (unless parties agree on the nullity of the contract).[16] Like the majoritarian view,[17] the *Ordonnance* does not require a judicial decision if the parties to the contract recognise its nullity and the subsequent presence of restitutionary claims. Finally, the *Ordonnance* only confirms the prevailing analysis in French law when it refers to a specific regime for those claims. Although the *Code civil* contains specific rules regarding undue payment (art. 1375-81) and case-law has recognised the general principle prohibiting **[52]**unjustified enrichment,[18] those rules are deemed unsuitable for the restitution after nullity. Consequently, according to the prevailing view, restitutionary claims are governed by an autonomous legal basis and a regime *sui generis*.[19] The *Ordonnance* codifies this view by dedicating a specific chapter to restitutionary claims (art. 1352–1352-9), which

[12] Earlier projects contained a comparable description of nullity. Yet, in those projects, the necessity of a judicial intervention was regulated in a separate article. See art. 1129 and 1130-1 *Avant-Projet Catala*; art. 78 and 85 *Projet Terré*, and art. 90 and 98 *Projet de la Chancellerie*.

[13] See e.g. Picod (n 2), no. 1.

[14] See Terré/Simler/Lequette, *Droit civil - les obligations* (Dalloz 2013), 109, no. 82.

[15] See the reference to Ponsard and Blondel in Ghestin et al. (n 4), 707, no. 2007, note 2. See *ibid.* for slightly different descriptions; Terré et al. (n 14), 109, nos. 81-2.

[16] Ghestin et al. (n 4), 995 *et seq.*, no. 2286 *et seq.*; Picod (n 2), no. 31; Terré et al. (n 14), 437, no. 390. For an alternative view, see Posez (n 3), 647 *et seq*.

[17] Ghestin et al. (n 4), 1000-2, no. 2291; Picod (n 2), no. 32; Terré et al. (n 14), 437, no. 389.

[18] See the *Boudier* judgment, Req. 15 June 1892, *DP* 1892, 1596, *S* 1893, I, 281. For the subsequent evolution, see Terré et al. (n 14), 1113, no. 1065.

[19] Cass. 24 September 2002, *Bull.civ.* I, no. 218, *D.* 2003, 369, note Aubert, *RTD Civ.* 2003, 284, obs. Mestre/Fages, *Defrénois* 2003, art. 37664, note Aubert. See Ghestin et al. (n 4), 1537, no. 2883. In Belgium, a similar opinion prevails. See Baeck, *Restitutie na vernietiging of ontbinding van overeenkomsten* (Intersentia 2012), 39 *et seq.* Others advocate the use of the rules on undue payment: e.g. Flour/Aubert/Savaux, *Droit civil - Les obligations - 1. L'acte juridique* (Dalloz 2014), 379, no. 362.

has not been integrated in the rules on undue payment (art. 1302–1302-3) or unjustified enrichment (art. 1303–1303-4).

6. For the purpose of this paper,[20] nullity must be distinguished from the concepts of inopposability (*inopposabilité*) and termination (*résolution*). In French law, opposability is viewed as the necessary complement to the obligatory effect a contract has between parties. It is described as the phenomenon that tends to make third parties acknowledge the existence of a contractual relationship. When a contract is '*inopposable*', (some) third parties are allowed to ignore the contract and to behave without having regard to the contract.[21] In this respect, a distinction is made between the 'internal' and the 'external' effects of a contract. 'Internal effects' can be described as the juridical effects directly affecting the parties to that contract, for example by imposing obligations on them; 'external effects' as the sole duty to acknowledge the existence of a contract and its influence on the juridical positions of the parties to that contract.[22] The distinction between termination and nullity is primarily connected to the types of defects justifying those remedies. In contrast to nullity, termination can be used as a remedy for fundamental non-performance. Consequently, while nullity relates to defects in the formation of juridical acts, termination can only be triggered by posterior circumstances.[23] Regarding the applicable regime, both remedies converge to a large extent. The most fundamental difference can be found in the powers of the judge: as opposed to his duty[24] to pronounce nullity when he is asked to do so, he has a large margin of appreciation **[53]**when considering the opportunity of terminating the contract.[25] In the use of those notions, the *Ordonnance* does not deviate from the generally accepted doctrinal analysis.

7. Although the aforementioned proposition is widely accepted in French scholarship, it does not offer a state-of-the-art solution. The proposition lacks any reference to the purpose of the infringed norm, despite its crucial importance for shaping and using nullity. The requirements for the validity of a contract consist of the consent of the parties, their capacity, and a licit and certain content (art. 1128). Art. 1162 explains that a contract may not derogate from the public order (*ordre public*), whether it be by means of its content or its goal. Regrettably, the project does not specify in what circumstances the content (or goal) of a contract would

[20] In the following parts, I will argue that the *Ordonnance* sometimes seems to confuse nullity with inopposability, which is detrimental for an appropriate use of those concepts (see 4.4.2). Moreover, the *Ordonnance* does not use the same methods for enforcing nullity and termination. Regarding one method, that differentiation does not appear to be based on solid arguments (see *infra* 5.5.1.5.1.2).

[21] Ghestin et al. (n 4), 785, no. 2076 and the references therein; Terré et al. (n 14), 542 and 547, nos. 483 and 490. The same distinction is made in Belgian law: see *inter alia* Wéry, *Droit des obligations - Volume 1: Théorie générale du contrat* (Larcier 2011), 863 *et seq.*, no. 922 *et seq*. The difference between nullity and inopposability is not to be exaggerated: in the end, the dichotomy between those notions only concerns their extent, and not their nature: Japiot (n 3), 33.

[22] *Cf.* Fontaine, 'Les effets "internes" et les effets "externes" des contrats', in Fontaine/Ghestin (eds.), *Les effets du contrat à l'égard des tiers* (LGDJ 1992), 40-66.

[23] Ghestin et al. (n 4), 780 *et seq*, no. 2073 *et seq.*; Picod (n 2), no. 16; Terré et al. (n 14), 110, no. 82.

[24] On some occasions, judges have discretion to decide whether or not to pronounce nullity. In those cases, the nullity is called 'facultative'. Regarding 'facultative nullities', see Ghestin et al. (n 4), 1042 *et seq.*, no. 2339 *et seq.*

[25] Ghestin et al. (n 4), 782-784, no. 2075.

derogate from the public order. In what circumstances does the infringement of a rule entail such a prohibited derogation?

In multiple modern codifications and doctrinal codes, the essence of nullity is not only found in a defect of the requirements for the validity of juridical acts, but also in a proportionate response to the infringement of a norm. Thus, several codes and projects put the aim of the infringed norm in the centre of attention. They mention the impact an infringement can have on juridical acts and contain a provision clarifying that not every violation of a mandatory norm entails the nullity of the juridical act.[26] Whether or not a certain infringement of a rule influences the validity of the juridical act depends on the goal of the infringed norm and the sanctions that can be used to realise that goal. Often, the purpose of a rule can be achieved more adequately by other remedies than nullity (for example by criminal or administrative sanctions).[27] The absence of a similar provision in the *Code civil* is unfortunately not remedied in the *Ordonnance*. Although art. 1184 para 2 *in fine* does mention the goal of the infringed norm, the relevance of the purpose of the rule seems limited to the *extent* of nullity. Since it is located in art. 1184, it does not seem to answer the question whether or not the infringement of a norm entails nullity, but appears limited to the question whether or not the nullity of a term will affect the entire contract.

3.2. The summa divisio between absolute and relative nullity

8. In line with the first article of the *Ordonnance* on nullity, the following three articles represent the view of the prevalent scholarly opinions in France and have their roots in **[54]**the preceding projects[28]. Art. 1179 contains the *summa divisio* in French private law between 'absolute' and 'relative' nullity. As stated in that article, the nullity is denominated 'absolute' when the transgressed rule aims to safeguard the general interest and 'relative' when it aims to safeguard a private interest. Pursuant to art. 1180 and 1181[29], the two fundamental differences between those nullities concern (1) the parties authorised to invoke the nullity and (2) the possibility to remedy that nullity by confirming the contract. An absolute nullity can be invoked by everybody having an interest in doing so, including the *ministère public*, but cannot be remedied by confirmation. In contrast, a relative nullity can only be invoked by the party that the law intends to protect, but can be remedied by confirmation. Although the

[26] E.g. § 134 BGB ("*A juridical act that violates a statutory prohibition is void, unless the statute leads to a different conclusion.*"); art. 3:40 para 3 DCC ("*The previous paragraph does not concern statutory provisions that do not purport to make a conflicting juridical act invalid.*"); art. II.–7:302 DCFR.

[27] *Cf.* Comment E ('Sanctions already incurred') on art. II.–7:302 DCFR, von Bar/Clive/Schulte-Nölke (eds.), *Principles, Definitions and Model Rules of European Private Law - Draft Common Frame of Reference* (*DCFR*) *- Full Edition* (2009), 568: "*If the rule in question provides for a criminal or administrative sanction against the wrongdoer, the imposition of that sanction may be enough to deter the conduct in question without adding the nullity of the contract. The goal of deterrence is usually better achieved through such criminal or administrative sanctions than by way of private law. Often such sanctions will take into account the degree of blameworthiness of the party concerned, and this may be a more appropriate response to the conduct than avoiding the contract in whole or in part*."

[28] See art. 1129-1 and 1129-3 *Avant-Projet Catala*; art. 79-81 *Projet Terré*, and art. 91-93 *Projet de la Chancellerie*.

[29] Similar provisions were present in earlier projects: see art. 1129-2 – 1129-3 *Avant-Projet Catala*; art. 80-81 *Projet Terré*, and art. 92-93 *Projet de la Chancellerie*.

distinction between absolute and relative nullity is well established in scholarship,[30] its explicit recognition and description in black letter rules is remarkable.

9. From a theoretical point of view, it remains doubtful whether a private law codification should ossify such a purely dogmatic distinction. The absence of a similar distinction in the *Code civil* offered scholars the necessary flexibility to create new concepts in order to deal with unexpected questions and/or societal changes. By rigidifying the *summa division* between absolute and relative nullity, the *Ordonnance* might rather hamper the further development of the law than support it.

10. Even if there were no theoretical drawbacks, there remain several reasons why art. 1179-81 seem a rather unfortunate and oversimplified representation of nullity and its different varieties.

First, according to the *Ordonnance*, absolute and relative nullities seem to be the only varieties. That appearance is contradicted by the actual French positive law. Although many of the nineteenth-century distinctions have dissipated,[31] the differences between for example textual and virtual nullities[32], and facultative and obligatory nullities[33] remain part of the French legal system. By concealing the existence of those nullities, the *Ordonnance* lacks the fastidiousness that is indispensable for a code which aims to (among other things) modernise, improve the legibility and the accessibility of the general law of contracts and obligations, and guarantee legal certainty and the efficacy of **[55]**legal norms.[34] Consequently, the *Ordonnance*'s oversimplification can frustrate nuanced solutions in private law.

> This can be illustrated by art. 1169. According to that article, an onerous contract is null when, at the moment of its formation, what is agreed on as a counterpart for the benefit of the person who took on an obligation, is illusory or derisory. This is for example the case when the insured 'risk' in an insurance contract does not exist (anymore) when the contract is concluded.[35] In the *Ordonnance*, that nullity must be either an absolute or a relative nullity: which one can be determined by investigating the specific protective goal of the infringed rule. Yet, the nullity of art. 1169 cannot easily be analysed in terms of 'protection'. Does that rule exist for the benefit of private individuals, or for the benefit of the general interest? Unsurprisingly, both positions have

[30] See Flour et al. (n 19), 332 *et seq.*, no. 324 *et seq.*; Ghestin et al. (n 4), 789 *et seq.*, no. 2091 *et seq.*; Picod (n 2), nos. 23-8; Terré et al. (n 14), 109 *et seq.*, no. 81 *et seq.*

[31] E.g. the difference between statutory and natural nullities, peremptory and comminatory nullities, permanent and transitory nullities, and extrinsic and intrinsic nullities: see Posez (n 3), no. 3 and the references therein.

[32] The explicit recognition of the virtual nullity (i.e. a nullity which is not expressly proscribed by a statute) could remedy the absence of a provision similar to § 134 BGB, art. 3:40 para 3 DCC or art. II.–7:302 DCFR. See *supra*, 3.1 *in fine*. For these nullities, see e.g. Ghestin et al. (n 4), 716 *et seq.*, no. 2018 *et seq.*

[33] For these nullities, see e.g. Ghestin et al. (n 4), 1042 *et seq.*, no. 2339 *et seq.*

[34] See art. 8 *Loi n° 2015-177 relatif à la modernization et à la simplification du droit et des procedures dans le domains de la justice et des affaires intérieures*: "*Dans les conditions prévues à l'article 38 de la Constitution, le Gouvernement est autorisé à prendre par voie d'ordonnance les mesures relevant du domaine de la loi nécessaires pour modifier la structure et le contenu du livre III du code civil, afin de moderniser, de simplifier, d'améliorer la lisibilité, de renforcer l'accessibilité du droit commun des contrats, du régime des obligations et du droit de la preuve, de garantir la sécurité juridique et l'efficacité de la norme*" (emphasis added).

[35] Traditionally, these problems are situations where the 'cause' of the obligation was absent.

been defended by French scholarship.[36] In reality, and contrary to what the *Ordonnance* states, nullity is not always about protection. In this case, for instance, arguments related to the protective aim of the infringed rule are intrinsically maladjusted. The legal order does not require the presence of a risk in order to 'protect' certain parties or the general interest, but to maintain the vital coherence of the concept of an insurance contract.[37] An insurance contract without a risk is just as inconceivable as a sales contract without a price. The solution for this problem can be found in the regrettably forgotten[38] distinction between natural and legal nullities. In earlier times, the applicable type of nullity to such problems was neither absolute nor relative, but 'natural' (this is pertaining to the 'nature' of the used concepts). As a result, the irrelevant question of the protective aim of the infringed rule was not raised. The *Ordonnance*, however, will force legal practitioners to ask the wrong questions, thus increasing the risk of unjustifiable solutions.

Second, the legal consequences connected to the distinction between absolute and relative nullity are not accurately represented.

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Regarding the persons authorised to invoke the nullity of the contract, the *Ordonnance* creates the illusion of an undeniable difference. In reality, it is hard to say whether there exists any distinction at all in this matter.[39] First, the authority for the *ministère public* to invoke the absolute nullity seems misplaced. Similar to Belgian law,[40] French law provides for that possibility when the public order is or is threatened to be endangered.[41] There is no one-to-one relationship between that 'endangerment' and the presence of an absolute nullity. Not every absolute nullity leads to an endangerment of the public order, and conversely, an absolute nullity is not required for the public order to become endangered. Second, a general, unspecified interest does not suffice for a party to provoke the absolute nullity of the contract; instead, a specific personal interest is required.[42] Third, the party that the law intends to protect is not always the only one authorised to rely on a relative nullity. Sometimes, representatives of the protected party or specific third parties (for example creditors) can also invoke such a nullity.[43] In this matter, the difference between the types of nullity is rather

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[36] For an overview, see Flour et al. (n 19), 344-346; Ghestin et al. (n 4), 854 *et seq*., no. 2157 *et seq*.; Sadi (n 4), 146-162, nos. 99-109.

[37] *Cf.* Japiot (n 3), 602-603: "*Nous rencontrons ici les nullités sanctionnant certaines règles qui, à la différence de toutes autres, ne sont pas à considérer comme des règles protectrices* […]. *S'il y a inefficacité dans ces hypothèses, c'est seulement parce qu'il est matériellement impossible qu'il en soit autrement* […]. *De même, on considère qu'il est nécessaire ou naturel de reconnaître l'inefficacité des actes dont l'objet ou la cause font entièrement défaut, ou sont d'une importance trop minime pour entrer en ligne de compte* […]. *Si l'assurance contractée après la réalisation du sinistre et la destruction de la chose assurée est nulle en principe, c'est que l'assurance ne se comprend pas sans un risque*."

[38] Luckily, some authors have recently discovered those nullities. See e.g. Sadi (n 4), 160 *et seq.*, no. 108 *et seq.*

[39] *Cf.* Ghestin et al. (n 4), 925, no. 2214: "*Entre les deux espèces, les différences de régime ont sans doute aujourd'hui perdu beaucoup de leur acuité*".

[40] Art. 138*bis*, § 1 *Code judiciaire*: "*Le ministère public agit d'office dans les cas spécifiés par la loi et en outre chaque fois que l'ordre public exige son intervention.*"

[41] See art. 423 *Code de procédure civile*: "[…] *il peut agir pour la défense de l'ordre public à l'occasion des faits qui portent atteinte à celui-ci.*"

[42] Ghestin et al. (n 4), 970-6, nos. 2255-6.

[43] For an overview of the parties authorised to invoke a relative nullity, see Flour et al. (n 19), 352 *et seq.*, no. 339 *et seq.*; Ghestin et al. (n 4), 927 *et seq.*, no. 2216 *et seq.*; Picod (n 2), no. 43-5; Terré et al. (n 14), 441 *et seq.*, no. 395 *et seq.*

attributable to the specific aims of the norm. In my opinion, the purpose of the norm that provides for a nullity will always determine who can invoke that nullity. When the protection only exists for the benefit of one of the contracting parties, the absence of a possibility for the other party to rely on nullity must not be explained by the categorisation of the concerned 'type' of nullity, but by an interpretation of the aim of the relevant norm.

In the same vein, it is too simple to state that absolute nullities, contrary to relative nullities, can never be confirmed. Again, the statement that an absolute nullity cannot be confirmed is not as undisputed as the *Ordonnance* and its predecessors suggest. Although the prevalent opinion shares that view, several contemporary authors mention specific situations in which absolute nullities can be confirmed as well.[44] In earlier times, scholars argued that every nullity, even an absolute nullity, can be confirmed in principle.[45] Art. 931-1, which is an exact copy of art. 1340 *Code civil*, illustrates that a general impossibility to confirm an absolute[46] nullity is not tenable. According to that paragraph, the heirs or successors of a donor can confirm the nullity of a gift after the death of the donor. During his lifetime, the donor cannot confirm the null act, but must repeat the gift. Scholarship adhering to the prevalent view struggles with the **[57]**classification of that provision and analyses its content as a 'paradox'.[47] In this situation as well, whether or not a null contract can be confirmed depends on the aim of the infringed norm and the specific circumstances in which the confirmation takes place. In my opinion, confirmation should be allowed each time it does not contravene the aim of the infringed norm at the time the confirmation ought to produce its effects. In this view, the rule of art. 931-1 can easily be explained: during the life of the donor, confirmation would contradict the aim of that provision (this is to protect the donor against a rash decision to donate); after his death, that aim does not preclude his heirs (or successors) from confirming the null donation.

3.3. The recognition of partial nullity

11. The *Code civil* of 1804 does not contain a general provision regulating the possibility to restrict nullity to specific effects of the contract. Scholarship however started from the particular art. 900 and 1172 *Code civil*[48] to elaborate a more comprising theory concerning partial nullity.[49] In line with previous projects,[50] the *Ordonnance* codifies that idea in one article (art. 1184): "*Lorsque la cause de nullité n'affecte qu'une ou plusieurs clauses du contrat, elle n'emporte nullité de l'acte tout entier que si cette ou ces clauses ont constitué un*

[44] See Flour et al. (n 19), 362, no. 348; Ghestin et al. (n 4), 1156-63, nos. 2470-3.

[45] See e.g. Aubry/Rau, *Cours de droit civil français d'après l'ouvrage allemand de C.-S. Zachariae*, III (Cosse 1856), § 337, 187, note 6; Japiot (n 3), 716.

[46] Scholarship equates art. 1340 *Code civil* with an absolute nullity. See e.g. Sana-Chaillé de Néré, 'Art. 1338 à 1340 - Fasc. 10', in *JCl.-Civ.* 2008, no. 95.

[47] In this vein, e.g., Sana-Chaillé de Néré (n 46), no. 93.

[48] Art. 900 *Code civil*: "*Dans toute disposition entre vifs ou testamentaire, les conditions impossibles, celles qui sont contraires aux lois ou aux moeurs, seront réputées non écrites.*"; art. 1172 *Code civil*: "*Toute condition d'une chose impossible, ou contraire aux bonnes moeurs, ou prohibée par la loi est nulle, et rend nulle la convention qui en dépend.*"

[49] See e.g. Simler, *La nullité partielle des actes juridiques* (LGDJ 1969). See Ghestin et al. (n 4), 1247 *et seq.*, no. 2575 *et seq.*

[50] Art. 1130-2 *Avant-Projet Catala*; art. 86 *Projet Terré* and art. 99 *Projet de la Chancellerie*.

élément déterminant de l'engagement des parties ou de l'une d'elles."[51]. Like the other articles dedicated to nullity, this article can be criticised on multiple grounds. The most important reasons concern the requirements the article imposes to restrict the effect of nullity and the scope of the article.

3.3.1. Requirements

12. Regarding the earlier *Projet d'Ordonnance*, a first remark could have been that the 'decisiveness' of the terms affected by nullity seems to be the only relevant factor in determining whether or not the nullity of those terms affects the complete contract. Opposite to art. 1130-2 *Avant-Projet Catala*, art. 86 *Projet Terré*, and art. 99 *Projet de la Chancellerie*, the *Projet d'Ordonnance* did not contain any reference to the purpose of the infringed norm. Though it is undisputed in French law that the extent of nullity is determined by those aims,[52] the *Projet d'Ordonnance* suggested that such goals are irrelevant. Luckily, art. 1184 has been amended in the *Ordonnance* to remedy the **[58]**unfortunate absence of any reference to the purpose of the infringed norm. At present, art. 1184 para 2 *in fine* states that the contract is maintained when the purpose of the infringed norm requires so.

13. Notwithstanding that welcome addition, a second point of critique is not dealt with by the *Ordonnance*. Like in the *Projet d'Ordonnance*, the nullity of a term will only entail the nullity of the entire contract if the term affected by nullity was 'decisive' ('*déterminant*') for the commitment of the parties. French scholars interpret that criterion as purely voluntarist or psychological[53] and focus of the intention of the parties to determine the extent of nullity. Nullity will affect the entire contract if the affected term has been the impulsive and determining condition for at least one party to enter into the agreement.[54] That reference to the 'intention' of the parties obfuscates the normative nature of the decision a judge has to take to determine the extent of nullity. What parties really agreed upon, was the (null) contract. What they would have agreed upon if they knew about the ground of nullity has never actually been agreed upon. Denying the actual powers of judges in this matter inhibits a proper understanding of the source, guiding principles, and limits of those powers. In my opinion, the debate on partial nullity can only benefit from recognising the normative task judges have in this matter. Thus, a criterion focusing on the different interests of all related parties seems preferable to a criterion that stresses the subjective intention of the parties.[55]

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[51] "*Where a ground of nullity affects only one or more terms of the contract, it only entails the nullity of the whole act if this term or these terms constituted a decisive factor for the commitment of the parties, or of one of them*."

[52] See Ghestin et al. (n 4), 1249 and 1309 *et seq.*, nos. 2577 and 2626 *et seq.*

[53] See e.g. Serinet (n **Error! Bookmark not defined.**), II – "Sur art. 1185".

[54] Ghestin et al. (n 4), 1254, no. 2584 and the references therein.

[55] In the same vein for Belgium, see e.g. Tanghe, *Gedeeltelijke ontbinding en vernietiging van overeenkomsten* (Intersentia 2015), 225, no. 212. *Cf.* art. II.-7:214 DCFR: "*If a ground of avoidance under this Section affects only particular terms of a contract, the effect of an avoidance is limited to those terms unless, giving due consideration to all the circumstances of the case, it is unreasonable to uphold the remaining contract.*"

3.3.2. Scope

14. Another questionable choice can be found in the scope of art. 1184. The aforementioned article only regulates the situation where the ground of avoidance affects one or more terms of the contract. Unfortunately, it does not extend that approach to situations where the ground of avoidance only requires that some consequences of a single term are not recognised by the legal order. Yet, the restriction of nullity in those situations is an established practice in current French positive law.[56] Perhaps one might argue that an extension of the scope of art. 1185 is superfluous, since an analogous application of art. 1184 could suffice. Although such an application *per analogiam* might indeed lead to a just solution in a particular case,[57] an extension of that article's **[59]**scope could only be beneficial for the accessibility and intelligibility of the *Ordonnance*. Furthermore, the consequences that art. 1184 gives rise to seem unnecessarily limited. The current wording of art. 1184 suggests that the only alternative for the nullity of an entire act is to be found in the nullity of one or more terms. So, contrary to for example the Dutch civil code[58] and the German *BGB*[59], art. 1184 does not provide for the possibility to convert a null contract in another, valid contract of a different type ('conversion'). Since the concepts of partial nullity, reduction, and conversion are in essence only specific applications of a more fundamental principle favouring juridical acts (*favor negotii*),[60] the *Ordonnance* misses out on the opportunity to codify those three concepts in one encompassing provision.[61] Such a single article would not only be a fundamental progression

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[56] See Flour et al. (n 19), 377-8, no. 360; Ghestin et al. (n 4), 1363 *et seq.*, no. 2675 *et seq.*

[57] In Germany, the prevalent opinion considers § 139 BGB (partial nullity) to be applicable *per analogiam* to those situations. See e.g. Busche, 'BGB § 139 Teilnichtigkeit', in Säcker (ed.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (Beck 2012), no. 26; Dorn, '§§ 139-141. Nichtigkeit II', in Schmoeckel/Rückert/Zimmermann (eds.), *Historisch-kritischer Kommentar zum BGB*, I, *Allgemeiner Teil §§ 1-240* (Mohr Siebeck 2003), (753) 768, no. 16; Roth, '§ 139 Teilnichtigkeit', in Habermann (ed.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Staudinger BGB - Buch 1: Allgemeiner Teil - §§ 139-163* (sellier 2010), no. 68. *Contra* Flume, *Allgemeiner Teil des Bürgerlichen Rechts*, II, *Das Rechtsgeschäft* (Springer 1965), 574, § 32, no. 2, littera d).

[58] Art. 3:42 DCC: "*When the necessary implications of an invalid juridical act are in conformity with those of another - valid - juridical act and this in such a degree that it is presumable that this other juridical act would have been chosen instead of the invalid one if the acting party or parties would have been aware of the invalidity of the latter act, then this invalid juridical act shall be converted by operation of law into that other valid juridical act with all its normal legal effects, unless such a conversion would be unreasonable towards an interested person who has not participated as a party in the involved juridical act.*"

[59] § 140 BGB: "*If a void juridical act fulfils the requirements of another juridical act, then the latter is deemed to have been entered into, if it may be assumed that its validity would be intended if there were knowledge of the invalidity*".

[60] That principle is well known in Italy and Spain. See e.g. (for Italy) Grasetti, 'Conservazione (principio di)', in *Enciclopedia del diritto*, IX (Giuffre 1961), 173-5; Marseglia, *La conservazione degli effetti negoziali tra principi e clausole generale* (Università degli Studi di Trento 2010), 68 p; (for Spain) Delgado Echeverría/Parra Lucan, *Las nulidades de los contratos* (Dykinson 2005), 215 *et seq.*; Marín Padilla, *El principio general de conservación de los actos y negocios jurídicos - "utile per inutile non vitiatur"* (Bosch 1990); Serrano Acitores, 'El principio de conservación de los contratos frente a las figuras de la nulidad y la anulabilidad', *Noticias Jurídicas* 2010. Moreover, the *Principes directeurs du droit européen du contrat* and the DCFR explicitly mention that principle as a guiding principle for those projects. For the *Principes Directeurs*, see art. 0:204 and Fauvarque-Cosson/Mazeaud (eds.), *European Contract Law – Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules* (sellier 2008), 496-514; for the DCFR, see von Bar et al. (eds.) (n 27), 62.

[61] In favour of such a general provision favouring juridical acts, see e.g. Van Schaick, *Contractsvrijheid en nietigheid* (Tjeenk Willink 1994), 279, no. 5.

compared to the *Code civil*, it would also prevent futile discussions relating to the (merely pedagogical) differences between partial nullity, reduction, and conversion.[62]

4. The use of nullity

15. Throughout the *Ordonnance* numerous articles decree the nullity of a contract if it does not comply with specific requirements, these are requirements that are generally not imposed for the validity of contracts (art. 1128). The following part will give a **[60]**brief outlook on how the *Ordonnance* utilises nullity as a remedy for contracts that infringe particular rules. The *Ordonnance*'s use of nullity is comparable to the way it treats fundamental aspects of the concept of nullity, analysed in the previous part. Although nullity is generally used in concordance with the prevalent views in French scholarship, that remedy seems disproportionate in some situations. In contrast, inopposability is used on other occasions where nullity would seem more appropriate. In other words: on the one hand, there are too many applications of nullity (4.1); on the other hand, nullity is not used enough (4.2). The following critical remarks take nothing away from the merits of the *Ordonnance* in opting for nullity as the applicable remedy for for example defects of consent (art. 1129-1144), incapacity (art. 1145-1152), and the violation of formal requirements (art. 1172 para 2).[63]

4.1. Too much nullity

16. Just like any other remedy, nullity should only be used when it is a proportionate reaction to the infringement of a norm. The severe consequences nullity entails are among the elements that need to be taken into account. In general, a null contract does not produce the desired legal effects. That drastic result signifies among other things that the parties to the contract are not protected for their expectation ('positive') interest, but only for their reliance ('negative') interest. Consequently, the decision to deny parties a protection equal to their expectation must be necessary in order to attain the goal of the infringed rule. If that goal can be achieved by means of less intrusive, but equally effective remedies, then those remedies must be preferred to nullity.

17. In art. 1123, art. 1124 para 3, and art. 1202, the *Ordonnance* seems to use nullity in cases where the less intrusive remedy of inopposability is available. According to art. 1124 para 3, a contract that violates a unilateral promise is null if the third party with whom it was concluded, was aware of the unilateral promise. If that third party did not act with the sole intention to harm the promisee, nullity seems disproportionate. In most situations, the interests of the harmed promisee are equally protected by a mere inopposability. The difference can be found in the position of the third party: when the contract is null, the third party can only claim reliance damages, whereas he might be able to claim expectation damages if the contract is only 'inopposable' to the promisee. In the latter case, the contract with the third party remains valid *inter partes*. A similar remark can be made with regard to art. 1123. That

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[62] *Cf.* Flume (n 57), §32, no. 9, littera a): "*Die Abgrenzung des § 139* [partial nullity] *und des § 140* [conversion] *stellt kein wesentliches Problem dar, weil die Regelung grundsätzlich die gleiche ist*."

[63] Certainly concerning the latter two, nullity can only be regarded as an adequate remedy if an automatic nullity is admitted.

article offers the beneficiary of a pre-emption agreement the right to invoke the nullity of a contract that infringes his right if the third party with whom the contract was concluded, was aware of his right. Again, in order to protect the beneficiary, a simple inopposability would suffice. There does not seem any reason to deny the third party the possibility to claim expectation damages in all circumstances. The same holds true for art. 1202. That provision, that has no equivalent in the previous projects, provides for the nullity of **[61]**contracts which aim for example to conceal a part of the price in a sale of immovable property. Also in respect to that article, nullity does not seem required. Why should a party to such an agreement have the possibility to withdraw from the agreement without any cost? In my opinion, the infringed tax norm could be enforced more effectively, more efficiently, and more proportionately by recovering the evaded tax and supplementary fines.[64]

4.2. Not enough nullity

18. A remarkable feat of the *Ordonnance* is that it seems to confuse nullity and inopposability also the other way around. Art. 1156 states that the contract concluded by an unauthorised representative is 'inopposable' to the principal. Yet, in this case, since the contract is in reality concluded between the principal and the third party, nullity is more appropriate – on the condition that an automatic nullity would be admitted. If a contract has no effects *vis-à-vis* the parties who concluded the contract, that contract is traditionally deemed 'null' in French law, and not merely 'inopposable' to those parties (or one of them).

5. The enforcement of nullity

19. For the purpose of this part, the 'enforcement' of nullity can be described as the pathway that needs to be followed in order for a juridical act to lack (this is to not produce) the intended legal effects. In general, three methods of enforcement are available. First, the legal order can automatically – *ipso iure* – not recognise the intended legal effects. In this case, the juridical act will not produce legal effects by force of law, thus without requiring any particular intervention. Second, a judicial intervention can be required. As long as nullity has not been decreed by a judge, the invalid juridical act still produces its legal effects. Third, nullity can be enforced via a unilateral, extrajudicial notification. It is sufficient that the authorised party declares to the other party that it relies on the nullity of the act, for the act to be deprived of its intended effects.

20. This part will investigate what types of enforcement are recognised in the French *Ordonnance*. Although the explicit choice for the obligatory judicial intervention is shared by a majority of contemporary scholarship, the rejection of the two other possibilities is criticisable (5.1). Yet, the way nullity can be enforced does not tell anything about the circumstances that determine whether or not nullity can still be enforced in a particular situation. It might be possible that nullity must be invoked within a specified time, or that certain behaviour can preclude a party from relying on nullity. Therefore, the obstacles to the

[64] For a similar position, see Court of Appeal Ghent 29 January 2013, *Nieuw Juridisch Weekblad* 2014, 357. *Cf.* Court of Appeal Ghent 7 October 2014, *Fiscoloog* 2015, 13.

enforcement of nullity (prescription, confirmation, and regularisation) will be analysed as well (5.2).

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5.1. Judicial enforcement

5.1.1. Principle

21. Confirming yet again the prevalent view in scholarship[65] but unlike other legal systems,[66] the *Ordonnance* clings on to the necessity of a judicial intervention in order to deprive a contract of its intended effects. In comparison to the previous projects, the judicial enforcement of nullity is even more prominently present in the *Ordonnance*. Whereas the requirement of a judgment was mentioned in one of the last articles on nullity in earlier projects, the *Ordonnance* boilerplates it in the very first one.

In French legal literature, the most prominent[67] characteristic of the judicial enforcement of nullity is that an action in nullity is required for nullity to deprive a contract of its effects. That action must be introduced within five years after the conclusion of the contract.[68] When five years have passed, the contract cannot be avoided anymore. Nevertheless, a party allowed to invoke nullity can still invoke nullity as a defence. That so-called 'exception of nullity' is not subject to prescription and can be invoked *ad aeternam*, as long as the contract has not been performed (art. 1185).[69]

5.1.2. Criticism

22. The *Ordonnance's* view does not leave room for a nullity which operates *ipso iure* and does not provide for the possibility to avoid a contract by unilateral notification. Both those consequences can be challenged: is it really justified to impose a judicial procedure for each and every nullity? First, the negation of an automatic nullity will be questioned; second, the choice to exclude a unilateral notification will be scrutinised.

23. Regarding the absence of an *ipso iure* enforcement, the following two objections can be raised.

First, this view obliges to create other, superfluous remedies in order to make up for the shortcomings of the 'judicial nullity'. The undebatable necessity of a judgment has resulted in

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[65] See Flour et al. (n 19), 341 *et seq.*, no. 332 *et seq.*; Ghestin et al. (n 4), 995 *et seq.*, no. 2286 *et seq.*; Picod (n 2), no. 31; Terré et al. (n 14), 437 *et seq.*, no. 390 *et seq.*

[66] See e.g. the Dutch (art. 3:49 *et seq.* DCC) and German (§ 143 BGB) legal systems and the DCFR (art. II.-7:209).

[67] Another characteristic relates to the constitutive nature of the judgment pronouncing nullity: Ghestin et al. (n 4), 1320, no. 2631; Gout, *Le juge et l'annulation du contrat* (Presses universitaires d'Aix-Marseille 1999), 95-96, no. 122. For criticism, see Flour et al. (n 19), 337, no. 329.

[68] Art. 2224 *Code civil*, as interpreted by the majority of French scholarship. See e.g. Flour et al. (n 19), 338, no. 331; Ghestin et al. (n 4), 1182 *et seq.*, no. 2519 *et seq.*; Picod (n 2), no. 63; Terré et al. (n 14), 109, no. 81.

[69] See Flour et al. (n 19), 369 *et seq.*, no. 356 *et seq.*; Ghestin et al. (n 4), 1220 *et seq*, no. 2542 *et seq.*; Picod (n 2), no. 76; Terré et al. (n 14), 458 *et seq.*, no. 417 *et seq*.

the emergence of a 'different' and 'independent' remedy, by which clauses are **[63]** 'deemed unwritten' *("réputée non écrite")*[70-71]. In contrast to a clause which is 'null', a clause which is 'deemed unwritten' does not require a judicial intervention in order to be deprived of its effects. A possible judgment will only have a declaratory effect: the judgment will only investigate whether all requirements are fulfilled, and if that is the case, it will conclude that the clause has never produced any effect whatsoever. The most important difference with a 'judicial nullity' is to be found in the unlimited period of time a party can invoke that a clause is deemed unwritten. Even when the contract has been concluded for example twenty years ago, a party can still rely on the protection offered by that remedy. If the *Ordonnance* had recognised the automatic enforcement of nullity, the same would have been true for nullity. Consequently, there would not have been any need to use the superfluous '*réputée non écrite*'.

Second, the refusal to acknowledge the existence of an automatically enforced nullity could be attributed to an imprecise analysis of the 'action in nullity' ("*action en nullité*"). Presently, the majoritarian view does not distinguish between a declaratory action to assess the nullity of an act (which is not subject to any prescription) and the constitutive action in restitution (which, in contrast, is subject to prescription). Yet, such a distinction could clarify that a judicial intervention is not required to deprive an act of its effects, but only to allow a subsequent restitionary claim.[72] By ossifying the judicial nature of nullity, the aforementioned distinction might be overlooked.

24. In the same vein, there are at least four reasons why the impossibility to avoid a contract by notification should be reconsidered.[73]

First, the arguments in favour of an obligatory judicial intervention fail to convince. According to Simler, who wrote the explanatory statement of the *Avant-Projet Catala* concerning nullity, it seems more just to impose the initiative on the person who invokes nullity, rather than on the person who contests the nullity of the juridical act.[74] In my opinion, the grounds of invalidity are too diverse to justify such a general statement. Is it **[64]**really an

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[70] On the relative autonomy of that remedy, see for example Ghestin et al. (n 4), 1318-21, no. 2631; Sadi (n 4), 597-604, nos. 513-22.

[71] In the *Ordonnance*, the 'réputée non écrite' is used in art. 1170, 1184 para 2, 1231-5, and 1343-5.

[72] In the same vein Hamelin, 'Le caractère judiciaire de la nullité à l'heure de la réforme du droit des contrats', *Petites affiches* 2014, issue 245, 4 *et seq*, no. 44 *et seq. Cf.* Posez (n 3), 647 *et seq.*; Sacco/De Nova, *Il Contratto*, II (UTET 1993), 483-4.

[73] Various French authors raise similar objections. See Rezgui, 'L'annulation unilatérale du contrat', *Petites affiches* 2009, issue 130, 6 *et seq.*; Sadi (n 4), 586-91, nos. 498-506; Sautonie-Laguionie, 'Le rôle du juge et des parties dans l'anéantissement du contrat en droit français', *Revue des contrats* 2013, issue 4, 1643 *et seq.* For a recent PhD-thesis related to this topic, see Jaouen, *La sanction prononcée par les parties au contrat* (Economica 2013).

[74] Simler, 'Exposé des motifs – Sanctions (art. 1129 à 1133)', in *Avant-Projet de réforme du droit des obligations* (n **Error! Bookmark not defined.**), (44) 45: "*A été écartée, au contraire, la possibilité d'une annulation unilatérale qui serait simplement notifiée à l'autre partie, celle-ci ayant alors la faculté de la contester. Une telle solution est proposée pour la résolution* (*art. 1158*). *Dès lors que la nullité n'a pas pu faire l'objet du constat mutuel ci-dessus évoqué, le contentieux est inévitable et il paraît alors plus juste d'en imposer l'initiative à celui qui demande la nullité qu'à celui qui la conteste*.". *Inter alia* Houtcieff shares his opinion: see 'Les sanctions des règles de formation des contrats', in Terré (ed.), *Pour une réforme du droit des contrats* (Dalloz 2009), (223) 228, no. 10).

equitable solution to impose a duty to start judicial proceedings on for example the victim of duress in order to deprive the contract of its binding effects? In reality, in remains unclear what reasons can justify such a solution.

Second, the obligatory judicial intervention seems incoherent. Why can a party opt for the validity of a null contract by an extrajudicial confirmation,[75] but not for the nullity of such a contract by a comparable notification?[76] If the *Ordonnance* had made the aforementioned distinction between 'nullity' and 'restitution', it would have been clear that the recognition of an extrajudicial confirmation should be accompanied by the possibility to opt for the nullity of a contract by means of a (extrajudicial) notification.

Third, the *Ordonnance* appears to make an unjustified distinction between nullity and termination for fundamental non-performance. In contrast to nullity, termination can be provoked by a unilateral notification (art. 1224 *et seq*.). Yet, it is difficult to see why a judicial intervention is intricately woven in the French conception of nullity, but not in the concept of termination.[77] Since judges have a large margin of appreciation when considering the opportunity of terminating the contract,[78] it would be more comprehensible if termination by notice was excluded.

Finally, in the actual proposition, excluding the possibility to avoid a contract by notification leads to undesirable effects. The *Ordonnance* excludes avoidance by notice, but contains a peculiar rule which allows a party to impose a burden on the party entitled to avoid the contract (art. 1183).[79] According to that provision, a party is allowed to impose a choice on the party entitled to avoid the contract between the confirmation of the contract and the judicial avoidance of the contract. If the latter party does not start proceedings to annul the contract in the first six months after the other party has imposed that choice, the contract is deemed confirmed. Under the current proposition, the contract is deemed confirmed if the party entitled to avoid nullity does not start judicial proceedings within six months, even if that party has notified its intention to opt for nullity within that period. Otherwise, such a notification could have been analysed as an extrajudicial nullity. The project has not clarified why a timely notification of the choice to rely on nullity cannot suffice. Instead, a party entitled to nullity is now obliged to commence judicial proceedings in order to maintain its protection, although a simple notification seems equally effective. It does not come as a surprise that the Dutch civil code and the *Projet Terré*, which contain a similar option to impose a burden of choice in art. 3:55 para 2 and art. 83, only require a 'choice'. It is by no means necessary that the party which is entitled to nullity commences judicial proceedings in the system of the Dutch civil code or the *Projet Terré*. The additional requirement in the *Ordonnance* to commence such proceedings does not seem justified; it is rather a cumbersome and superfluous burden.

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[75] See art. 1182-1183.

[76] See Sadi (n 4), 588, no. 502: "*De même, puisque la confirmation d'un acte peut avoir lieu par acte unilatéral, il serait logique que, par symétrie, il en soit de même pour l'annulation.*"

[77] See Sadi (n 4), 588, no. 502: "*Or on voit mal en quoi la nullité est plus judiciaire que la résolution.*"

[78] See *supra*, 3.3.1.

[79] A comparable rule was proposed by the *Avant-Projet Catala* (art. 1129-5).

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5.2. Obstacles to the enforcement of nullity

5.2.1. Prescription

25. In the *Ordonnance*, no provision explicitly deals with the prescription of the so-called 'action in nullity'. In contrast, earlier projects contained a specific article on the prescription of that action.[80] The absence of a similar provision can be explained by the enactment of the Statute of 17 June 2008 on prescription[81]. Since scholarship accepts that the modified art. 2224 *Code civil* also imposes a five year time limit on each and every nullity,[82] a similar provision in the *Ordonnance* would be excessive. Again, a more precise analysis of the action in nullity could nuance the prescription of the 'action in nullity'. With regard to a purely declaratory action to ascertain whether the discussed act is null or not, a time limit does not seem justified. In contrast, when the action in nullity must be regarded as a restitutionary action, the presence of a time limit is understandable.[83]

26. Notwithstanding the modification of the applicable time limits, the aforementioned Statute has not regulated the so-called 'exception of nullity'. According to French tradition, as long as the contract has not been executed, a party can still invoke nullity as an exception even if the time limit has expired.[84] Contrary to the previous *Projet d'Ordonnance*, the *Ordonnance* does mention that specific rule (art. 1185) – just like earlier projects.[85]

5.2.2. Confirmation

27. A second possible obstacle to enforce nullity can be found in the confirmation of the null contract. One of the novelties in the *Ordonnance* with regard to confirmation is its definition: art. 1182 para 1 describes confirmation as an act by which a person entitled to invoke nullity renounces that right.[86] Like the *Code civil*[87], the *Avant-Projet Catala* and the *Projet Terré* did not contain a description of the notion of 'confirmation', or were at least less clear.[88-89] Apart from that definition, the article on confirmation can be regarded as a step backwards compared to art. 1338 *Code civil*.

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[80] *Avant-Projet Catala*: art. 1130 para 1; *Projet Terré*: art. 84 para 1; *Projet de la Chancellerie*: art. 97 para 1.

[81] *Loi n° 2008-561 du 17 juin 2008 portant réforme de la prescription en matière civile.*

[82] See 5.5.1.5.1.1 and the references in n 68.

[83] *Cf.* Hamelin (n 72), no. 42 *et seq.*

[84] See the references in n 69.

[85] The three previous projects did contain a provision dedicated to the 'exception of nullity': *Avant-Projet Catala*: art. 1130 para 2; *Projet Terré*: art. 84 para 2; *Projet de la Chancellerie*: art. 97 para 2.

[86] For a comparable definition, see art. 94 para 1 *Projet de la Chancellerie*.

[87] Art. 1338 *Code civil.*

[88] The *Avant-projet Catala* did not define 'confirmation' in art. 1129-4, and the *Projet Terré* was more ambiguous in its art. 81 *et seq*.

[89] See Wicker/Boucard, 'Les sanctions relatives à la formation du contrat', *JCP G* 2015, (32) no. 11.

First, it does not mention the concept of 'ratification' anymore, although that notion is still used throughout the project.[90] Consequently, one could be persuaded to think that confirmation and ratification are completely separate concepts, whereas art. 1338 *Code civil* demonstrates that they are quintessentially the same. They produce the same legal effect, this is the loss of the possibility to rely on nullity as a defence. It is hard to understand why one – and only one – of those concepts has been defined.

Second, in line with other articles concerning nullity, art. 1182 para 3 is an oversimplification.[91] According to the *Ordonnance*, the voluntary performance of the contract amounts to confirmation if the performing party is aware of the ground of invalidity.[92] An exception is recognised in the following phrase of the article: in the case of duress, confirmation can only take place after the duress has ceased. It seems to limit grounds of invalidity to defects of consent, thus equating the awareness of a ground of invalidity with its cessation. That might be correct for duress, but not for for example incapacity. The awareness of an incapable party of its incapacity does not imply that its incapacity has suddenly ceased. A minor can be perfectly aware of its incapacity, but that realisation does not influence his incapacity. Consequently, a voluntary performance of a minor should not result in confirmation, contrary to what art. 1182 para 3 suggests. In this respect, art. 1338 (para 2) *Code civil* is more refined: in present-day French law, voluntary performance only entails confirmation if it takes place at a time when the obligation could be validly confirmed or ratified.[93]

5.2.3. Regularisation?

28. A third obstacle for the avoidance of a contract lies in the so-called regularisation. Ever since the ground-breaking thesis of Dupeyron[94], French scholars have debated the precise content of that notion.[95] According to Ghestin, Loiseau, and Serinet, regularisation can be defined as a juridical act, which is not regulatory nor legislative, which validates, retroactively and *vis-à-vis* everyone, an act that was initially null by adding the element, objective or subjective, which the act initially lacked.[96] Regularisation occurs for example when a party offers to repair the disadvantageous effects of the voidable act and results in the loss of the possibility to invoke nullity. Contrary to the *Code civil*, which does not recognise that concept, the *Ordonnance* made one specific application in art. 1183 para 2. According to that rule, in case of mistake, a party cannot invoke **[67]**nullity anymore when the other party has

[90] See for example art. 1156 para 3; 1161 para 2; 1204 para 3; 1301-3 and 1342-2 para 2.

[91] See Wicker/Boucard (n **Error! Bookmark not defined.**), no. 13.

[92] Art. 1182 para 3.

[93] "*A défaut d'acte de confirmation ou ratification, il suffit que l'obligation soit exécutée volontairement après l'époque à laquelle l'obligation pouvait être valablement confirmée ou ratifiée*." *Cf.* art. II.-7:211 DCFR: "*If a party who is entitled to avoid a contract under this Section confirms it, expressly or impliedly, after the period of time for giving notice of avoidance has begun to run, avoidance is excluded.*".

[94] Dupeyron, *La régularisation des actes nuls* (LGDJ 1973).

[95] For an overview, see Ghestin et al. (n 4), 1053-71, nos. 2364-83; Picod (n 2), nos. 54-60.

[96] Ghestin et al. (n 4), 1071, no. 2383: "*La régularisation se définit comme un acte juridique, ni réglementaire, ni législatif, qui valide, rétroactivement et à l'égard de tous, un acte initialement nul, en lui apportant l'élément, objectif ou subjectif, qui lui faisait défaut*".

offered to perform the contract the way the mistaken party has understood the contract. Both the scope and the choice to codify that rule in art. 1183 can be criticised.

Regarding the scope, it remained vague why the project did not contain a more general provision concerning regularisation.[97] In contrast, the previous *Projet Terré* explicitly recognised that notion independent from confirmation and proposed the following, general art. 90: "*Sauf disposition légale contraire, la régularisation restitue son plein effet à un contrat par la suppression de l'imperfection qui l'affecte ou par l'accomplissement de la formalité requise*."[98] Although the primary use of the article might be found in cases of mistake, it seems too radical to suppose that regularisation cannot play a role in other situations. If the disadvantageous effects caused by a ground of invalidity other than mistake are repaired by an offer made by the other party, why should the party entitled to invoke nullity still be able to invoke nullity?

A second debatable choice was the insertion of that rule in art. 1183 of the *Projet*. Since it was proposed as para 2 in that article, it might seem that the time limit of six months mentioned in paras 1 and 3 also applied to regularisation. In other words, the party entitled to invoke nullity might seem to have six months time to refuse the repairing offer. However, if the offer repairs the disadvantageous effects, a choice to refuse the offer seems unjustified.[99]

Hence, it does not come as a surprise that the *Ordonnance* has struck out art. 1183 para 2. Yet, that does not imply that the notion of regularisation has been completely abandoned. Contrary to the *Projet d'Ordonnance*, the *Ordonnance* provides for the possibility to regularise contracts which are null due to the violation of a formal requirement (art. 1172 para 2). Unfortunately, the *Ordonnance* remains cryptic regarding that possibility and does not clarify in what circumstances a regularisation could take place.

6. General appreciation

6.1. A textbook example of Begriffsjurisprudenz

29. In my opinion, the most fundamental critique with regard to the *Ordonnance*'s rules on nullity can be found its lack of fastidiousness. The proposed set of rules concerning nullity reveals that the drafters had a stunningly narrow scope of cases in mind when drafting the rules, thereby denying the complexity of real-life situations. It seems only the easiest and least challenging situations have been taken into account. **[68]**More problematic cases appear undervalued and dismissed as irrelevant exceptions to a beautiful and coherent system. Yet, in my opinion, such hard cases must not merely stand on equal footing with less defiant cases; they must be at the centre of attention when drafting a normative framework. The ability of a

[97] The Dutch civil code, which only recognises a comparable rule to art. 1183 para 2 of the *Projet* for mistake and undue influence, has also been criticised for not containing a more general provision. See e.g. Hijma, *Nietigheid en vernietigbaarheid van rechtshandelingen* (Kluwer 1988), 188 *et seq*. Similarly, the DCFR offers the possibility to adapt the contract in case of mistake (art. II.-7:203) and unfair exploitation (art. II.-7:207).

[98] "*Unless a statutory rule provides otherwise, the regularisation restitutes the full effect to a contract either by suppressing the imperfection that affected the contract or by fulfilling the required formality*."

[99] *Cf.* Wicker/Boucard (n **Error! Bookmark not defined.**), no. 17.

code to resist the ravages of time depends on it. There are only two solutions for hard cases when a newly elaborated code does not pay sufficient attention to them: one can either apply the rule as it is narrowly conceived, or give an extensive interpretation to the rule. None of those solutions are suitable. The first one will not provide for an adequate solution of hard cases; the second one will frustrate the aim of the *Ordonnance (*that is – among other things – to modernise, ameliorate the legibility and the accessibility of the general law of contracts and obligations, and guarantee legal certainty and the efficacy of legal norms) since the legal practice will inevitably differ from the black letter rule. In other words: the preference of the *Ordonnance* for concepts over interests is a dubious legislative choice.

30. The lack of fastidiousness also underlies the formal presentation of the discussed rules. One might say that art. 1178-85 rather resemble a summary of a legal handbook than a codification. Due to the didactical aim of legal handbooks, a certain simplification is comprehensible: if an introduction to nullity would incorporate all nuances, readers (for example students) might not be able to acquire a sufficient insight in the basic structures. In my opinion, a codification must not focus on didactics, but predominantly on a well-balanced and insightful solution for possible problems. In that respect, scholarly definitions and distinctions might guide those solutions, but must not be confused with the solutions themselves.

By confusing the aim of handbooks with the aim of a codification, the proposed regulation regarding nullities is useless at best, harmful at worst. It is useless, since its content mainly[100] corresponds to the prevalent views in French legal literature. What is the use of a codification if it only restates what the dominant authors in French law already agree upon? But more importantly, the proposed regulation could, to a certain extent, frustrate its aim. As shown before, the concept, use, and enforcement of nullity in the *Ordonnance* is not entirely reconcilable with the necessity to provide for a solution for hard cases: either the *Ordonnance* does not enable an adequate solution, or the legal practice differs considerably from the black letter rule.

6.2. Are there any lessons for Belgium and the Netherlands?

31. Presently, Belgian law still uses the same black letter rules concerning nullity as France. Nullity is not regulated in a general and comprising way, though some scarce (and unclear) provisions are present in the Belgian *Code civil*. If an overarching framework is deemed necessary, the *Ordonnance* does not offer much suitable inspiration. In contrast, the *Ordonnance* can be regarded as an unequivocal *caveat* for a future Belgian **[69]**revision.[101] The rather unfortunate draft of a general theory of nullity can warn Belgian drafters to avoid mistaking a summary of a legal handbook for a solid black letter codification. Since the *Ordonnance*'s approach to regulating nullity should be reconsidered, a future revision of the

[100] One could mention art. 1183 as an exception. Yet, a similar result could presently be obtained by a specific use of the requirement of good faith and fair dealing.

[101] Recently, the Policy Paper of the Ministry of Justice has announced the plan to reform certain parts of the Belgian *Code civil*: see Chambre of Representatives 2015-16, www.dekamer.be/FLWB/PDF/54/1428/54K1428008.pdf. See also Dirix/Wéry, 'Tijd voor een hercodificatie van het Burgerlijk Wetboek', *Rechtskundig Weekblad* 2015-16, 2.

Belgian *Code civil* must take a cautious approach and pay sufficient attention to the fundamental mechanisms determining equitable solutions when dealing with nullity.

32. Similarly, the answer to the question whether the *Ordonnance* can be useful for the current Dutch approach is rather disappointing. Contrary to the *Ordonnance*, the Dutch civil code has indeed (to some extent) reconsidered the concept, use, and enforcement of nullity, thus introducing regulation that is probably much more able to resist the ravages of time. In fact, it remains puzzling why none of the different French projects has considered using the Dutch civil code as a starting point, at least with respect of nullity. The actual provisions of the *Ordonnance* do not seem able to suggest any amelioration of the current Dutch law. The concept of nullity (art. 3:40 DCC), however imperfect and criticisable it may be,[102] is still more suitable than art. 1178. The same holds true for the use and enforcement of nullity. Although the concept of '*relatieve nietigheid*' (used in for example art. 3:45 DCC) is less refined in my opinion than the French and Belgian concept of *'inopposabilité*', the Dutch civil code seems to use nullity in general more appropriately than the *Ordonnance*. The Dutch civil code does not contain for example a similar provision to art. 1123, 1124 para 3, or 1203.[103] With regard to the enforcement of nullity, the Dutch civil code recognises an automatic – *ipso iure* – nullity (for example art. 3:39-40 DCC) and allows avoidance by notification (art. 3:49 *et seq.* DCC). Contrary to the *Ordonnance*, art. 3:54 DCC provides for a (more)[104] general provision allowing a party to regularise the voidable act by offering to repair its disadvantageous effects. Since art. 3:49 DCC recognises the possibility to avoid a juridical act by a **[70]**unilateral notification, the last point of criticism regarding art. 1183[105] does not apply to Dutch law.

7. Conclusion

33. This article has scrutinised whether the *Ordonnance* has grasped the opportunity to boldly go where the *Code civil* has not gone before and to design a general framework for nullity.

In art. 1178-85, the *Ordonnance* has indeed grasped the opportunity: in those articles, the *Ordonnance* makes explicit choices regarding the concept of nullity and its enforcement (and obstacles) that were not made in the *Code civil*. However, that pronounced approach is not

[102] For an overview of the content and interpretation of art. 3:40 DCC, see Hartkamp/Sieburgh, *Verbintenissenrecht – Algemeen overeenkomstenrecht* in *Mr. C. Asser's Handleiding tot de beoefening van het Nederlands Burgerlijk Recht*, 6-III (Kluwer 2014), nos. 310-346; Hijma/van Dam/van Schendel/Valk, *Rechtshandeling en Overeenkomst* (Kluwer 2013), nos. 147-158. For a critical appreciation, see e.g. Hartkamp/Sieburgh (this note), nos. 347-347g; Hijma *et al.*(this note), no. 148: according to van Dam, "*de regeling van art. 3:40* [is] *geen schoolvoorbeeld van eenvoud. Het belangrijkste onderdeel van deze bepaling – de regeling van de rechtshandeling in strijd met de wet – spant in dit opzicht de kroon en kan worden beschouwd als één van de lelijkste eendjes van het BW*." ("*The regulation of art. 3:40 is not a prime example of simplicity. The most important part of this provision – the regulation of the juridical act contrary to the law – takes in this regard the cake and can be regarded as one of the most ugly ducklings of the Dutch civil code*").

[103] For a brief presentation of those provisions, see *supra* 4.4.1.

[104] Art. 3:54 DCC only regards abuse of circumstances. Art. 6:230 DCC contains a similar rule for error. The limited scope of the possibility to regularise juridical acts this way has been criticised by e.g. Hijma (n 97), 188 *et seq.*

[105] See *supra* 5.5.1.5.1.2

satisfactory. Several arguments plead against the proposed concept, use, and enforcement of nullity. Those points of criticism boil down to one single underlying objection regarding the chosen approach. Throughout the *Ordonnance*, the articles related to nullity demonstrate the *Ordonnance'*s preference of concepts over interests. The *Ordonnance* seems more concerned with the recognition of French legal concepts (such as the distinction between absolute and relative nullity and the indispensable judicial intervention for nullity to have effect) than with a comprising, balanced, and transparent regulation of conflicting interests. In this regard, the analysed articles might even be considered as a textbook example of *Begriffsjurisprudenz*.[106] The articles on nullity have become the prisoner of artificial categorisation, itself the result of unsatisfactory distinctions: between judicial nullity and automatic '*réputée non écrite*', and between unconfirmable absolute nullity and confirmable relative nullity.[107] The lack of fastidiousness will either lead to a strict interpretation of the proposed provisions, thereby inhibiting an adequate solution, or to an extensive interpretation or application *in analogiam* of the available articles, thus frustrating the *Ordonnance*'s goal to improve legal certainty and to make the general law of contracts and obligations more accessible and legible. Due to the debatable oversimplification in the proposition, the main lesson for Belgian law can only be that future drafters should be very cautious in designing a general framework, certainly if such a framework was deemed too controversial by the drafters of the *Code civil*. The French choice to mainly codify widely accepted doctrinal analyses precludes any progress in comparison to the regulation of nullity in the Dutch civil code. Consequently, with regard to nullity, the *Ordonnance* does not offer any **[71]**innovation whatsoever for the further development of the Dutch law. In general, the doctrinal French approach seems too self-contained and regards itself too much as an unparalleled expression of a specific legal culture, to serve as a fruitful basis for future codifications, at least concerning the remedies for invalid juridical acts.

[106] See von Jhering, *Scherz und Ernst in der Jurisprudenz* (Breikopf und Härtel 1904), 347: With Begriffsjurisprudenz is meant *„jene Verirrung unserer heutigen Jurisprudenz (…), welche, den praktischen Endzweck und die Bedingungen der Anwendbarkeit des Rechts außer Acht lassend, in demselben nur einen Gegenstand erblickt, an dem das sich selber überlassene, seinen Reiz und Zweck in sich selber tragende logische Denken sich erproben kann, - eine Arena für logische Evolutionen, für die Gymnastik des Geistes, in der dem größten Denkvirtuosen die Palme zufällt*."

[107] Paraphrase of the majority judgment in Cavendish Square Holding BV v Talal El Makdessi (Rev 3) [2015] UKSC 67, para 31, relating to the penalty rule: "*In our opinion, the law relating to penalties has become the prisoner of artificial categorisation, itself the result of unsatisfactory distinctions: between a penalty and genuine pre-estimate of loss, and between a genuine pre-estimate of loss and a deterrent*."